

# Sussex County man appeals ruling on photos in sex assault trial

By [Christopher Dela Cruz/The Star-Ledger](#)

July 23, 2009, 5:51PM

BUTLER -- A Vernon man who claims he is caught up in a case of mistaken identity is appealing a judge's ruling barring him from showing a jury photos of his private parts -- images that he contends contradict a victim's description of her attacker.

On Wednesday, Superior Court Judge Salem Ahto, sitting in Morristown, ruled the photos of defendant Andrew Pena, of Vernon, will not be admissible in his upcoming trial in the Butler attack.

Pena's defense attorney, Alex Pagano, wanted the photos admitted into evidence at trial because he said they dispute the woman's description of her attacker having larger-than-normal genitals.

Morris County Assistant Prosecutors Robert Lane and Julie Serfess wanted the photos blocked because they believe there is no way to authenticate or replicate them. A defense representative took the photos of Pena in jail in September, and there is no way to recreate in jail the motivation and circumstances the assailant had during the attack two years ago, the prosecutors argued.

In prohibiting the photos, Ahto ruled the size of the attacker's genitals was not the only identifier. The victim picked Pena out of a lineup, a fingerprint from her vehicle was a match to Pena and a footprint matched his shoe. Pena also told police he was at the scene and was the person who told the woman to move her car.

Today, Pagano filed an emergent appeal of Ahto's ruling with the state Appellate Division.

Jury selection, which had been under way this week for the trial in Superior Court in Morristown, is expected to resume Monday. The trial could be delayed if the appellate court decides to hear the appeal.

The assault occurred Jan. 28, 2007, at 3:15 a.m. when the woman waited inside a car parked near G&A Bagels off southbound Route 23 as her friends went inside, an arrest affidavit said. A man sweeping outside the store told the woman she couldn't park there and directed her to the back of the building, where the attack occurred, the affidavit said.